

FARRIS, MATHEWS, BRANAN
BOBANGO & HELLEN PLC

ATTORNEYS AT LAW

618 Church Street, Suite 300
Nashville, TN 37219

(615) 726-1200 telephone
(615) 726-1776 facsimile

00 MAR 17 PM 4 10

EXECUTIVE SECRETARY

March 17, 2000

MEMPHIS DOWNTOWN
One Commerce Square, Suite 2000
Memphis, TN 38103

(901) 259-7100 telephone
(901) 259-7150 facsimile

MEMPHIS EAST
530 Oak Court Drive, Suite 345
Memphis, TN 38117

(901) 762-0530 telephone
(901) 683-2553 facsimile

Of Counsel
Henry H. Hancock
Marye Helen Owen

William W. Farris
Harlan Mathews
Homer Boyd Branam, III
John A. Bobango ^{1,2}
Tim Wade Hellen
Edwin Dean White, III
Charles B. Welch, Jr.
John Michael Farris ²
D. Edward Harvey
Eugene Stone Forrester, Jr.
Dedrick Brittenum, Jr.
Barry F. White
Robert F. Miller
Robert A. McLean ⁵
Anita I. Lotz
Jerry W. Taylor
Michael B. Chance
Mark E. Beutelschies ¹

Steven C. Brammer
Richard H. Booth
Robert D. Hyde ⁴
Michael T. Evangelisti
Kimberly Harris Jordan
Garrett M. Estep ³
Montgomery B. Sernel
Paul C. Peel
Jon F. Minkoff

¹ also licensed in Arkansas
² also licensed in Florida
³ also licensed in Kentucky
⁴ also licensed in Mississippi
⁵ Tennessee R31 Listed Mediator

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

VIA HAND DELIVERY

Re: **APPLICATION AND JOINT PETITION OF MEMPHIS LIGHT, GAS, & WATER
AND A&L NETWORKS-TENNESSEE, LLC FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE, INTRALATA
TELECOMMUNICATIONS SERVICES
DOCKET NO. 99-00909**

Dear Mr. Waddell:

Enclosed for filing, please find the original plus thirteen (13) copies of the Pre-Hearing Brief submitted on behalf of the Intervenor, Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association. This filing is timely made in accordance with the one-day extension to which Intervenor's counsel and counsel for Petitioner and Joint Applicants agreed. Copies are being served on parties of record.

If you have any questions or concerns with regard to this filing, please do not hesitate to contact me.

Very truly yours,
**FARRIS, MATHEWS, BRANAN
BOBANGO & HELLEN, P.L.C.**

Charles B. Welch, Jr.
Charles B. Welch, Jr.

cc: Carolyn Marek
Dean Deyo
Stacey Burkes

POSTED
3-20-00

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**APPLICATION OF MEMPHIS NETWORKX, LLC
FOR A CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATION SERVICES AND JOINT
PETITION OF MEMPHIS LIGHT GAS & WATER
DIVISION, A DIVISION OF THE CITY OF
MEMPHIS, TENNESSEE ("MLGW") AND A&L
NETWORKS-TENNESSEE, LLC ("A&L") FOR
APPROVAL OF AGREEMENT BETWEEN MLGW
AND A&L REGARDING JOINT OWNERSHIP OF
MEMPHIS NETWORKX, LLC.**

DOCKET NO. 99-00909

**PRE-HEARING BRIEF FILED ON BEHALF OF TIME WARNER TELECOM
OF THE MID-SOUTH, L.P., TIME WARNER COMMUNICATIONS OF
THE MID-SOUTH, AND THE TENNESSEE CABLE
TELECOMMUNICATIONS ASSOCIATION**

Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association (collectively referred to as the "Intervenors") file this pre-hearing brief in accordance with the procedural schedule, as modified by agreement of the parties, set forth in the Report and Recommendation of Pre-hearing Officer, dated March 9, 2000 and approved and adopted by the Tennessee Regulatory Authority ("TRA") at its Conference on Tuesday, March 14, 2000.

PRELIMINARY STATEMENT

The Report and Recommendation of Pre-hearing Officer sets forth nine issues. Issues 1, 2, 3, 6, 7, 8 and 9 will require certain findings of fact. Although the formal discovery prescribed by the procedural schedule has been

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completed, the factual information provided by the Applicant and the Joint Petitioners appear to be so totally inconsistent that reconciliation is impossible. The Intervenor's rely upon the pre-filed direct testimony of William J. Barta filed on behalf of the Intervenor, Tennessee Telecommunications Association ("TCTA"), on March 16, 2000 for the purpose of generally describing these inconsistencies. The specific inconsistencies are clearly illustrated by juxtaposing the information provided by the Applicant and Joint Petitioners by way of their Application and their Responses to the TCTA's Data Requests against the information supplied by Joint Petitioner, Memphis Light Gas & Water division, in its response to a written request for public records submitted by Time Warner Communications of Mid-South, L.P. in December of 1999. The Applicant and Joint Petitioners refer to this response as the "December Public Records Response" in this Response to TCTA Data Request No. 30. Until such time as these inconsistencies are explained or otherwise reconciled, these Intervenor's are not in a position to brief these issues which are critically dependant upon accurate factual information. Issues 4 and 5 appear to be questions which could be categorized as issues of law. Accordingly, this brief attempts to preliminarily address these issues 4 and 5 in that limited context.

ISSUE NO. 4

Does the MLG&W interest in Memphis Networkx, LLC violate Article 2, Section 29 of the Tennessee Constitution?

Article 2, § 29 of the Tennessee Constitution provides in pertinent part that public funds cannot be expended for private purposes, and that

the credit of no County, City or Town shall be given or loaned to or in the aid of any person, company, association or corporation, except upon the election to be first held by the qualified voters of such county, city or town, in the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of the majority.

Arguably, Memphis Light Gas & Water ("MLG&W"), a division of the City of Memphis, owns stock in, and is a majority owner, of the private company, Memphis Networx, LLC. MLG&W proposes to become a stockholder of the private company without holding an election. These developments, at least initially, indicate that MLG&W has violated the constitutional prohibition against city ownership of stock in a private company without first holding a public election.

The facts indicate that MLG&W has used public funds for a private purpose. "Private purpose" has not been precisely defined by the Supreme Court. However, in McConnell v. City of Lebanon, 314 S.W.2d 12, (Tenn 1958), the Court held that the issuance of municipal bonds for the construction of a factory, which was leased to a private corporation, pursuant to the Industrial Building Bond Act of 1955, was for public purpose, and thus, constitutional. The Court was particularly swayed by the express explanation of the Act's purpose, as well as the fact that adequate safeguards controlled municipal expenditures. Id. at 19. Specifically, the Court observed that the legislature enacted the Industrial Building Bond Act of 1955 to combat population loss and economic stagnation in Tennessee, and noted that the Act expressly provided for a three-fourths vote of the citizens before bonds could be issued. Id. at 13.

When contrasting the pertinent provisions of the Act authorizing municipalities to provide telecommunications services against the Industrial Bond Building Act of 1955 authorizing municipalities to purchase land for a private industrial park, clear differences undeniably exist. The latter has express public purpose provisions and spending controls, whereas the former does not. Compare, Chapter 209, Public Acts of 1955 to T.C.A. §7-52-401. In summary, the law granting municipal electric corporations authority to offer telecom services is for the nonpublic purpose of market expansion.

Assuming that the funds that MLG&W has invested in Memphis Networx is for nonpublic purposes, the second issue is whether MLG&W is an agent or arm of the City of Memphis. Numerous Tennessee cases addressing this issue have determined that the term “county, city or town” as contained in Article II, § 24, include such entities as industrial and hospital boards. For example, in Ft. Sanders Presbyterian Hospital v. The Health and Education Facilities Board of the County of Knox, 453 S.W.2d 771, 775 (Tenn. 1970), the Supreme Court determined that a nonprofit industrial board was an arm and instrumentality of the city. Likewise, the Court in Mayor of Nashville v. Indus and Development B.D. of City of Nashville, 332 S.W.2d 202, found that the industrial board was an agency or instrumentality of the City of Nashville.

More recently, a Tennessee Court of Appeals determined that a county hospital violated Article 2, §29 by creating a business venture with private entities. Cleveland Surgery Center v. Bradley County Memorial Hospital, 1999 Tenn. App. LEXIS 196. The appellate court upheld a trial court’s determination that the

county hospital fell under the definition of a “county, city or town” because the hospital was acting as “an agent and arm of Bradley County.” The appellate court based its conclusion upon a Supreme Court decision that a county hospital was an agency of the county for purposes of the Worker’s Compensation Act.

We do not believe that a worker’s compensation setting involves a definition of ‘State of Tennessee,’ ‘counties thereof,’ and ‘municipal corporations,’ that is different from the usual definitions of these terms. The ‘City of Jackson’ can only be defined in one manner, whether the underlying case involves worker’s compensation act, tort, contract, municipal corporation law, or whatever.

Id. at *9, fn.3. MLG&W has been defined as a division or agency of the City of Memphis in numerous Tennessee Court decisions, and, therefore, it should fall into the definition of “city” for Article 2, §29. See e.g., Hall Construction Corporation v. Tidwell, 507 S.W. 2d 697, (Tenn. 1974); Williams v. MLG&W, 773 S.W. 2d 522 (finding that MLG&W is an agency of the City of Memphis for the purposes of the Governmental Torts Liability Act).

If providing telecom services via its chosen business entity is a nonpublic purpose, and if MLG&W is an agent or arm of the City of Memphis, then the last determination is whether MLG&W has either lent its credit to or bought stock in Memphis Network. This determination is fact dependant, and the evidentiary discrepancies frustrate the final analysis.

ISSUE NO. 5

To what extent, if any, is MLG&W's participation as a member of Memphis Networx, LLC in the proposal to offer telecommunications services effected by its charter and that of the City of Memphis?

In response to the TCTA's Data Request No. 27, asking MLG&W to identify with particularity "any and all charter provisions, ordinances, resolutions, rules and regulations which authorize [it] to enter into the proposed business relationship with A&L Networks to organize Memphis Networx and/or provide the telephone communication services described in the application," MLG&W responded that it "principally relies upon Chapter 381 of the Private Acts of 1939, as amended, and codified as Article 65 of the Chapter and related laws of the City of Memphis...." (Responses of Memphis Networx, LLC, MLGW and A&L to Data Requests of the Tennessee Cable Telecommunications Association, Response to Request No. 27, Page 14.) The referenced legal authority comprises approximately 900 pages of text. Due to the time constraints in this docket, it has been virtually impossible for the Intervenors to determine whether MLG&W has the authority it asserts to hold.

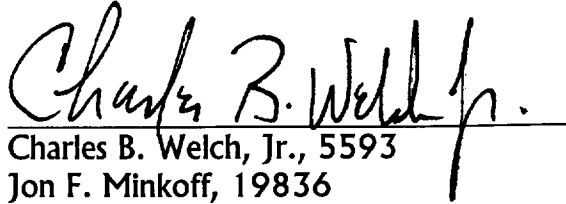
The burden of proof, however, is not upon the Intervenors to prove that MLG&W lacks the authority to offer the services subject to its petition. On the contrary, MLG&W, similar to every other competing local exchange carrier that petitions the TRA for a Certificate of Convenience and Necessity, shoulders the burden of proving, among other things, that it is qualified to transact business in the State of Tennessee; that its charter and by-laws permit it to engage in the business

of providing telecommunications services; and that its board of directors or supervisory board has approved all acts necessary to begin operating as a telecommunications services provider. Therefore, the burden is placed upon MLG&W to prove that its Charter authorizes the activities proposed in its Application and Petition. Intervenors submit that their limited research indicates that MLG&W is not expressly authorized by any of the documents referenced in the response to Data Request No. 27 to provide telecommunications services. MLG&W is only expressly authorized by Article 65 of the Charter of the City of Memphis to provide gas, water, and electric services.

Since MLG&W seeks permission to engage in a commercial activity, MLG&W will be required to show some express grant of legislative authority because telecommunications is a type of activity historically prohibited by the Courts. As a general rule, municipal corporations are deemed governmental in their object and purpose and are prohibited from engaging in any commercial activity. See, Nashville v. Fischer, 1 Tenn. Cas. (Shann) 345 (1874). Courts have observed that “any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the municipal corporation and the power is denied.” See generally, Mayor of Nashville v. Link, 80 Tenn. 499 (1883); Crabtree v. Steffens, 198 Tenn. 149 (1955). Only powers can be implied that are essential to the object and purpose of the municipality. See generally, Penn-Dixie Cement Corp. v. Kingsport, 189 Tenn. 450 (1949); Mayor of Bristol v. Dixon, 55 Tenn. 864 (1875).

Respectfully submitted,

FARRIS, MATHEWS, BRANAN,
BOBANGO & HELLEN, P.L.C.

A handwritten signature in cursive script, reading "Charles B. Welch, Jr.", written over a horizontal line.

Charles B. Welch, Jr., 5593

Jon F. Minkoff, 19836

Attorneys for the Time Warner Telecom
of the Mid-South, L.P., Time Warner
Communications of the Mid-South, and
the Tennessee Cable Telecommunications
Association,

618 Church Street, Suite 300

Nashville, Tennessee 37219

(615) 726-1200

CERTIFICATE OF SERVICE

I Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing Request to Conduct Discovery Depositions on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid or by hand delivery, as designated below, this the 17th day of March, 2000.

D. Billye Sanders, Esquire

Waller Lansden et al.

511 Union Street, Suite 2100

-Served via hand delivery

P.O. Box 198966

Nashville, TN 37219-8966

Henry Walker, Esquire

Boult, Cummings, et al.

414 Union Avenue, Suite 1600

-Served via U.S. mail

P.O. Box 198602

Nashville, TN 37219-8062

Guy M. Hicks, Esquire

BellSouth Telecommunications, Inc.

Suite 2101

-Served via U.S. mail

333 Commerce Street

Nashville, TN 37201-8062

John Knox Walkup, Esquire

Wyatt, Tarrant & Combs

511 Union Street, Suite 1500

-Served via hand delivery

Nashville, TN 37219-1750

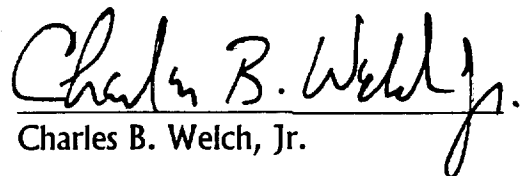
R. Dale Grimes, Esquire

Bass, Berry & Sims, P.L.C.

2700 First American Center

-Served via U.S. mail

Nashville, TN 37238


Charles B. Welch, Jr.